No. 76-768

In the Supreme Court of the United States

OCTOBER TERM, 1976

GEORGE RIOS, ET AL., PETITIONERS

v.

ENTERPRISE ASSOCIATION STEAMFITTERS, LOCAL NO. 638 OF U.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ABNER W. SIBAL,
General Counsel,
JOSEPH T. EDDINS,
Associate General Counsel,
BEATRICE ROSENBERG,
MARY-HELEN MAUTNER,
Attorneys,
Equal Employment Opportunity Commission,
Washington, D.C. 20506.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-768

GEORGE RIOS, ET AL., PETITIONERS

v.

ENTERPRISE ASSOCIATION STEAMFITTERS, LOCAL NO. 638 OF U.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINIONS BELOW

The opinion of the court of appeals dealing with back pay (Pet. App. 9–33) is reported at 542 F. 2d 579. The opinion of the district court on back pay (Pet. App. 1–8) is reported at 400 F. Supp. 988. An earlier opinion of the court of appeals (Pet. App. 82–113) is reported at 501 F. 2d 622 and that of the district court (Pet. App. 34–68) at 360 F. Supp. 979.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1976. The petition for a writ of cer-

tiorari was filed on December 6, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below erred in denying back pay to members of the plaintiff class who were discriminatorily denied access to employment opportunities as apprentices in violation of Title VII of the Civil Rights Act of 1964.

STATEMENT

On February 26, 1971, petitioners filed a class action against respondents Enterprise Association Steamfitters, Local 638 ("Local 638" or "the union"), the Mechanical Contractors Association of New York, Inc. ("MCA"), and the Joint Steamfitting Apprenticeship Committee of the Steamfitters Industry Education Fund ("JAC") alleging employment discrimination against black and Spanish surnamed individuals in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.* The action was consolidated with a Title VII suit filed by the Attorney General of the United States alleging that Local 638 and JAC had engaged in a pattern and practice of discrimination against nonwhites. The court subsequently substituted the Equal Employment Opportunity Commission as party plaintiff in the government's action pursuant to 42 U.S.C. (Supp. V) 2000e-6(c).

The district court, after an extended trial, found that the union had unlawfully discriminated against

nonwhites in virtually every aspect of its membership and work referral practices (Pet. App. 50–62). Of particular relevance here, the court found that, through the use of a discriminatory written aptitude examination, nonwhites had unlawfully been denied an equal opportunity to gain admission to union membership through the apprenticeship program (Pet. App. 57–58).[1] The discriminatory tests had disqualified a far greater proportion of nonwhite than white applicants[2] and were not shown to be job-related (Pet. App. 46, 57–58, 67).

Having concluded that the plaintiff class had been unlawfully discriminated against in admissions to the apprenticeship program, the district court nonetheless refused to award back pay (Pet. App. 3–4). The

---

[1] At the time of trial, the apprenticeship program was a five-year program, consisting of 9,100 hours of fully paid employment as apprentice steamfitters and 720 hours of classroom training for most of which apprentices were paid a salary. Apprentices were paid a percentage of a journeyman's wages according to the following schedule (Pet. App. 44–45):

1st year—40% of journeyman wages
2nd year—50% of journeyman wages
3rd year—60% of journeyman wages
4th year—70% of journeyman wages
5th year—85% of journeyman wages

[2] Only 21.48% of the minority applicants passed the test while 41.37% of the whites passed it. Because of the disproportionate impact of the tests, only 3.99% of the persons admitted to the apprenticeship program during those years were minorities although they comprised nearly 10% of the total number of applicants (Pet. App. 46, 67). The number of minority applicants in those years (124) was far less than the number of actual vacancies (526) (Pet. App. 67).

court of appeals, by a divided panel, affirmed, ruling that individual monetary harm resulting from the discrimination was too speculative or hypothetical (Pet. App. 20–21). The writer of the opinion, Judge Oakes, would have granted back pay to those who were victims of discrimination in the apprenticeship program because their situation was indistinguishable from the nonwhite journeymen granted an opportunity to prove their back pay claims (Pet. App. 20). However, as Judge Oakes explained (Pet. App. 20–21):

> My brothers Mansfield and Gurfein, however, feel quite otherwise. They believe it to be within the proper exercise of the conceded discretion of the district court, *Albemarle, supra,* 422 U.S. at 421–23, to deny as hypothetical any back-pay in connection with the apprenticeship program, at least where, as here, there was no purposefully bad motive. In their view, even though would-be nonwhite apprentices were victims of discrimination by the JAC, their injury is too remote, and any damages suffered by them altogether too speculative in the sense of the problem of proof, to permit an award. In this regard my brothers point out that an applicant would have to prove the following essential elements to recover:
>
> That if nondiscriminatory tests for admission to the program had been formulated and administered (which, of course, never occurred), the applicant would have passed them;

> That he would have progressed satisfactorily through the three- or four-year program to graduation; and
>
> That he would then have obtained employment as a steamfitter.

ARGUMENT

Although the United States and the Equal Employment Opportunity Commission did not elect to file a petition for a writ of certiorari in this case, we believe that the decision of the court of appeals was erroneous.

1. Having found that the apprenticeship program did in fact discriminate against nonwhites, the courts below wrongly precluded the individual claimants from demonstrating how they were damaged by that discrimination. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405; *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747. The back pay issues arising out of the discriminatory exclusion from a salaried apprenticeship program are no more speculative in quality than back pay questions generated by exclusion from any other salaried employment. By its very nature, the process of resolving back pay claims involves hypothetical considerations as to what would have occurred absent the defendant's unlawful conduct, and as a result "[u]nrealistic exactitude is not required." *Pettway* v. *American Cast Iron Pipe Co.,* 494 F. 2d 211, 260 (C.A. 5); *Meadows* v. *Ford Motor Co.,* 510 F. 2d 939, 946 (C.A. 6).

Since the defendant's unlawful conduct has created the necessity for these difficult back pay judgments any "uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating [defendant]." *Pettway* v. *American Cast Iron Pipe Co., supra,* 494 F. 2d at 260–261.[3]

The court of appeals' decision precluding back pay because of what are fairly typical difficulties in making back pay determinations is contrary to the congressional intent to establish an effective Title VII remedy and to the principle that "backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 421. See, also, *Johnson* v. *Goodyear Tire and Rubber Co.,* 491 F. 2d 1364, 1379 (C.A. 5).

2. The court of appeals' ruling as to the burden of proof that individual class members must meet in order to obtain back pay benefits is also incorrect. The court stated that a class member discriminatorily excluded from salaried apprenticeship could not obtain a back pay award without demonstrating that "if nondiscriminatory tests for admission to the program had been formulated and administered * * *,

[3] See also *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 773, n. 32; *Day* v. *Mathews,* 530 F. 2d 1083, 1086 (C.A.D.C.).

the applicant would have passed them" (Pet. App. 21).[4]

The burden placed by the court of appeals on injured class members is impossible to meet and, if applied generally, would frustrate the statutory goal of making whole the victims of past discrimination. See *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 421. In a Title VII action the initial burden is on the plaintiff to demonstrate that he is within the class discriminated against, and that he was both available and eligible for those positions. *Pettway* v. *American Cast Iron Pipe Co., supra,* 494 F. 2d at 259–260. But where one of the stated requirements for a position has been found discriminatory, eligibility is determined not by reference to some hypothetical test, but to those nondiscriminatory criteria actually employed. *Baxter* v. *Savannah Sugar Refining Corp.,* 495 F. 2d 437, 444–445 (C.A. 5). Plaintiffs, who in this case have proven discrimination against the class, need only show that they were eligible to do the work when judged by the nondiscriminatory criteria actually utilized by JAC (including age, residency, and physical ability) (Pet. App. 47) in order to demon-

[4] The court also stated that the applicant must demonstrate that he would have satisfactorily progressed through the apprenticeship program and required proof that the applicant would have obtained employment as a steamfitter (Pet. App. 21). Apparently, the court failed to recognize that the apprenticeship program was itself an employment opportunity, and that back pay was required to remedy a discriminatory exclusion independent of whether plaintiffs would have obtained future job opportunities.

strate their entitlement to a back pay remedy. The perpetrator of the unlawful conduct bears the burden of resolving any uncertainties concerning hypothetical performance. Cf. *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 773, n. 32.[5]

A proper allocation of proof does not mean that back pay relief will be awarded to every class member. The respondents are entitled to show that the claimant would not have been selected for the apprenticeship program for reasons peculiar to him. See *Baxter* v. *Savannah Sugar Refining Corp., supra,* 495 F. 2d at 445; *Day* v. *Mathews, supra,* 530 F. 2d at 1085. By reversing this burden at the outset, however, the court of appeals required the Title VII claimant to reconstruct the hypothetical past with a certainty which, because of respondent's conduct, could virtually never be attained. That result is inconsistent with the make-whole purpose of the Title VII remedy (118 Cong. Rec. 7168 (1972)).

3. Finally, to the extent that the Second Circuit accorded any weight to the absence of a "purposefully bad motive" in denying back pay (Pet. App. 21), it contravened this Court's specific holding in *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 422–423, that a defendant's good faith, or lack of bad faith, does not justify denial of a pay award.

[5] Even if it is assumed, *arguendo*, that the Second Circuit properly assigned to the claimant the burden of demonstrating that he would have passed a nondiscriminatory test, it was improper for the court to exclude claimants from attempting to meet this burden. If, for example, any of the applicants who failed the discriminatory test can show that he passed a nondiscriminatory test subsequently administered by JAC, he presumably has met his burden of proving eligibility. In this respect, it is noteworthy that in 1973, after administration of the new test, approximately 140 to 175 nonwhites were admitted to the apprenticeship program (J.A. 1121–1122).

Such an alternative cannot, however, meet the objections to the denial of back pay to members of the class. Many, if not most, of the previously rejected applicants probably did not reapply to the apprenticeship program in 1973. Because of the considerable lapse in time since they had been rejected, most of the nonwhite applicants probably found it necessary to move on to other occupations.

CONCLUSION

For the foregoing reasons, the Equal Employment Opportunity Commission does not oppose the granting of the petition for a writ of certiorari.[6]

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General,
ABNER W. SIBAL,
General Counsel,
JOSEPH T. EDDINS,
Associate General Counsel,
BEATRICE ROSENBERG,
MARY-HELEN MAUTNER,
Attorneys,
Equal Employment Opportunity Commission.

FEBRUARY 1977.

[6] Moreover, because argument in the court of appeals in this case took place shortly after this Court's decision in *Franks*, *supra*, and the *Franks* decision is not discussed in the portion of the opinion of the court of appeals concerning proof burdens, the Court may deem it appropriate to grant the petition and vacate the judgment of the court of appeals insofar as it sustained the denial of back pay to apprentices and apprentice applicants and remand to that court for further consideration in light of *Franks*.

U.S. GOVERNMENT PRINTING OFFICE: 1977